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# MARRIAGE EQUALITY AND FAMILY DIVERSITY: COMPARATIVE PERSPECTIVES FROM THE UNITED STATES AND SOUTH AFRICA

*Holning Lau\**

## INTRODUCTION

In honor of the fortieth anniversary of the U.S. Supreme Court's decision in *Moore v. City of East Cleveland*,<sup>1</sup> the *Fordham Law Review* convened a symposium that examined the extent to which the law protects family diversity. *Moore* invalidated a single-family zoning ordinance that barred extended family members from living together.<sup>2</sup> In striking down the ordinance, the Court trumpeted the right of individuals to decide how to structure one's own family.<sup>3</sup>

This Article contributes to the symposium by exploring the topic of family diversity through a comparative analysis of law in the United States and South Africa. Juxtaposing these countries sheds light on shortcomings of the United States's jurisprudence on family diversity. The comparative analysis also helps illuminate the path ahead for reforming both countries' laws to better respect family diversity.

This Article proceeds in two parts. Part I examines the United States's and South Africa's competing approaches to same-sex marriage. Both countries' highest courts ruled that excluding same-sex couples from marriage is unconstitutional,<sup>4</sup> but they took divergent paths to reach that conclusion. This Article contends that the Constitutional Court of South Africa paved a better road for other countries to follow because it developed

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\* Reef C. Ivey II Distinguished Professor of Law & Associate Dean for Faculty Development, University of North Carolina School of Law. Thank you to Clare Huntington, Robin Lenhardt, and Danielle Rapaccioli for inviting me to write this Article for the *Fordham Law Review* Family Law Symposium entitled *Moore Kinship* held at Fordham University School of Law. For an overview of the symposium, see R.A. Lenhardt & Clare Huntington, *Foreword: Moore Kinship*, 85 FORDHAM L. REV. 2551 (2017). Thank you to Hillary Li for research assistance and to my colleague Maxine Eichner for helpful conversations on this project. I am also grateful for having had the privilege of presenting parts of this Article at the 2017 Annual Meeting of the Association of American Law Schools and at the Rutgers Center for Gender, Sexuality, Law and Policy.

1. 431 U.S. 494 (1977).

2. *Id.* at 495–96.

3. *Id.* at 504–06; *id.* at 507–08 (Brennan, J., concurring). Many of the symposium participants persuasively argued, however, that the Court should have gone further in articulating support for family diversity.

4. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) (S. Afr.).

a superior conceptualization of the right to marry. Part II looks beyond same-sex marriage to explore new frontiers for reforming laws to address family diversity both in the United States and in South Africa. Specifically, Part II examines proposals to extend rights and responsibilities to couples who choose not to marry.

### I. COMPETING APPROACHES TO SAME-SEX MARRIAGE

In *Obergefell v. Hodges*,<sup>5</sup> the U.S. Supreme Court ruled that excluding same-sex couples from marriage was unconstitutional.<sup>6</sup> *Obergefell* is significant not only to the United States but also to other countries around the world. Boris Dittrich, advocacy director of the LGBT Rights Program at Human Rights Watch, predicted that *Obergefell* “will reverberate in many countries that still deny people the right to marry the person they love.”<sup>7</sup> As countries around the world draw inspiration from *Obergefell*, however, they should also look to the South African same-sex marriage case, *Minister of Home Affairs v. Fourie*.<sup>8</sup> Compared with *Obergefell*, *Fourie* offers a more compelling conceptualization of the relationship between marriage and dignity.

The *Obergefell* majority held that bans on same-sex marriage violated constitutional protections of liberty and equality.<sup>9</sup> With respect to liberty, the Court stated that the bans infringed the fundamental right to marry, thus violating the Fourteenth Amendment’s protection of substantive due process.<sup>10</sup> The bans also violated equal protection by impermissibly discriminating against gays and lesbians.<sup>11</sup>

In discussing the fundamental right to marry, Justice Kennedy’s majority opinion portrayed marriage as an institution that confers dignity upon those who enter into it. Justice Kennedy explained that marriage “promise[s] nobility and dignity to all persons, without regard to their station in life.”<sup>12</sup> He further explained that marital dignity applies to same-sex couples as well as different-sex couples, stating, “There is dignity in the bond between two men or two women who seek to marry.”<sup>13</sup> Justice Kennedy put marriage on a grandiose pedestal, stating that “marriage is essential to our most profound hopes and aspirations. . . . [It is] fulfillment in its highest meaning. . . . No union is more profound than marriage.”<sup>14</sup>

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5. 135 S. Ct. 2584 (2015).

6. *Id.* at 2607–08.

7. *US: Supreme Court Upholds Same-Sex Marriage*, HUM. RTS. WATCH (June 26, 2015, 10:48 AM), <https://www.hrw.org/news/2015/06/26/us-supreme-court-upholds-same-sex-marriage> [<https://perma.cc/43LD-S6XP>].

8. 2006 (1) SA 524 (CC) (S. Afr.).

9. *Obergefell*, 135 S. Ct. at 2604.

10. *Id.* at 2597–03.

11. *Id.* at 2602–04. The Court noted that “[e]ach concept—liberty and equal protection—leads to a stronger understanding of the other.” *Id.* at 2603.

12. *Id.* at 2594.

13. *Id.* at 2599.

14. *Id.* at 2594, 2602, 2608.

Moreover, Justice Kennedy suggested that unmarried individuals are to be pitied. According to *Obergefell*, “Marriage responds to the universal fear that a lonely person might call out only to find no one there.”<sup>15</sup> As a result, being unmarried is “be[ing] condemned to live in loneliness, excluded from one of civilization’s oldest institutions.”<sup>16</sup> Commentators have criticized *Obergefell* for implying that people must marry to live fulfilling and dignified lives.<sup>17</sup> The opinion’s emphatic rhetoric marginalizes people who do not wish to marry and people who simply have not found the right partner to wed. *Obergefell* obscures the fact that, although marriage is indeed a good choice for many couples, it is not right for everyone.<sup>18</sup>

Nearly a decade before *Obergefell*, the Constitutional Court of South Africa ruled in *Fourie* that depriving same-sex couples of the ability to marry violated constitutional protections of dignity and equality.<sup>19</sup> The Constitutional Court of South Africa became the first national apex court to decide that barring same-sex couples from marriage was unconstitutional.<sup>20</sup> No other judicial opinion on same-sex marriage has done as well as *Fourie* at explaining the relationship between same-sex marriage and dignity.

Justice Albert “Albie” Louis Sachs’s majority opinion in *Fourie* made clear that marriage does not dignify couples;<sup>21</sup> rather, it is the legal right to decide whether to marry—and whether to marry someone of the same sex—that is central to dignity. The court acknowledged that many same-sex couples might choose not to marry if given the opportunity<sup>22</sup> and, instead of denigrating that choice, explained that “what is in issue is not the decision to be taken, but the choice that is available. If heterosexual couples have the option of deciding whether to marry or not, so should same-sex couples have the choice.”<sup>23</sup>

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15. *Id.* at 2600.

16. *Id.* at 2608.

17. See, e.g., Leonore Carpenter & David S. Cohen, *A Union Unlike Any Other: Obergefell and the Doctrine of Marital Superiority*, 104 GEO. L.J. ONLINE 124, 124–25 (2015); Nan D. Hunter, *Interpreting Liberty and Equality Through the Lens of Marriage*, 6 CALIF. L. REV. CIR. 107, 107–08 (2015); Clare Huntington, *Obergefell’s Conservatism: Reifying Familial Fronts*, 84 FORDHAM L. REV. 23, 28–30 (2015); Michael Cobb, Editorial, *The Supreme Court’s Lonely Hearts Club*, N.Y. TIMES (June 30, 2015), [https://www.nytimes.com/2015/06/30/opinion/the-supreme-courts-lonely-hearts-club.html?\\_r=0](https://www.nytimes.com/2015/06/30/opinion/the-supreme-courts-lonely-hearts-club.html?_r=0) [https://perma.cc/29ZN-BC3V].

18. In the interest of disclosure, I should note that I am married and love being married. I have also previously written about marriage’s stabilizing effect on many couples’ relationships, which improves couples’ health and well-being. See generally Holning Lau & Charles Q. Strohm, *The Effects of Legally Recognizing Same-Sex Unions on Health and Well-Being*, 29 LAW & INEQ. 107 (2011).

19. *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at 569 para. 114 (S. Afr.).

20. Four other countries had extended marriage rights to same-sex couples through national legislation by the time *Fourie* was decided. See Holning Lau, *Comparative Perspectives on Strategic Remedial Delays*, 91 TUL. L. REV. 259, 278 n.103 (2016).

21. *Fourie* 2006 (1) SA 524 (CC) at 553–54 para. 72.

22. *Id.*

23. *Id.*

To the best of my knowledge, *Fourie* is the only judicial opinion on same-sex marriage that has explicitly engaged queer and feminist critiques of marriage.<sup>24</sup> The court acknowledged that some same-sex couples may reject marriage because they perceive marriage as overly conventional, assimilationist, commercialized, or symbolically tied to stereotypical gender roles.<sup>25</sup> *Fourie* did not disparage the rejection of marriage; instead, it explicitly recognized that South Africa has a “multitude of family formations”<sup>26</sup> and is committed to “respect across difference.”<sup>27</sup>

To be sure, *Fourie* acknowledged that marriage is extremely meaningful and of great importance to many people due to its legal and cultural consequences.<sup>28</sup> However, unlike *Obergefell*, *Fourie* did not suggest that individuals become dignified by entering marriage. Whereas *Obergefell* located dignity in the institution of marriage itself, *Fourie* located dignity in the autonomy to choose whether to marry.<sup>29</sup> According to *Fourie*, denying same-sex couples this choice strips couples of dignity because it “negate[s] their right to self-definition in a most profound way.”<sup>30</sup> Denying same-sex couples this freedom also inflicts dignitary injury upon gays and lesbians at large, not just coupled gays and lesbians, because it reinforces social perceptions of inferiority.<sup>31</sup>

In addition, *Fourie* and *Obergefell* differ because the *Fourie* opinion acknowledged that marriage rights are important precisely because marriages often fail: “[T]he law of marriage is invoked both at moments of blissful creation and at times of sad cessation.”<sup>32</sup> If a couple is married, the government will help the couple resolve differences if they break up.<sup>33</sup> Divorce is a legal instrument that the government makes available to

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24. The court quoted philosopher Cheshire Calhoun:

Queer theorists worry that pursuing marriage rights is assimilationist, because it rests on the view that it would be better for gay and lesbian relationships to be as much like traditional heterosexual intimate relationships as possible. To pursue marriage rights is to reject the value of pursuing possibly more liberating, if less conventional, sexual, affectional, caretaking, and economic intimate arrangements. Feminists worry that pursuing marriage rights will have the effect of endorsing gender-structured heterosexual marriage.

*Id.* at 553 para. 72 n.81. For a summary of queer and feminist critiques of marriage, see Suzanne A. Kim, *Skeptical Marriage Equality*, 34 HARV. J.L. & GENDER 37, 42–47 (2011).

25. *Fourie* 2006 (1) SA 524 (CC) at 553–54 para. 72.

26. *Id.* at 548 para. 59.

27. *Id.* at 549 para. 60; *see also id.* at 548 para. 59 (“[I]t is inappropriate to entrench any particular form [of family] as the only socially and legally acceptable one.”).

28. *Id.* at 550–54 paras. 63–72.

29. *Obergefell* does briefly acknowledge that choosing whether to marry is an important decision. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (noting that “the right to personal choice regarding marriage is inherent in the concept of individual autonomy”). This acknowledgement is, however, overshadowed by other parts of *Obergefell* that glorify marriage as an institution that confers dignity. *See supra* notes 12–17 and accompanying text.

30. *Fourie* 2006 (1) SA 524 (CC) at 554 para. 72.

31. *Id.* at 553 para. 71.

32. *Id.* at 554 para. 73.

33. *Id.*

married couples. In acknowledging the potential failure of marriages, *Fourie* avoids overromanticizing the institution.

The U.S. Supreme Court should have drawn inspiration from *Fourie*, extending marriage rights to same-sex couples while also recognizing the dignity of unmarried people. Instead, *Obergefell* delivered a conception of dignity that was much too narrow. In the United States, a growing number of adults are already choosing not to marry, with marriage rates presently at an all-time low.<sup>34</sup> Roughly half of U.S. adults are now married, whereas seven out of ten were married in the 1960s.<sup>35</sup> Commentators have argued that U.S. public policies should be adjusted to protect unmarried adults.<sup>36</sup> Yet, *Obergefell* stymies such reforms by reinforcing norms that relegate unmarried adults to the shadows.

Consider the issue of family leave.<sup>37</sup> If a couple in the United States is married and one spouse falls seriously ill, the other spouse has a right, pursuant to the Family and Medical Leave Act (FMLA), to take unpaid employment leave to care for the ill spouse.<sup>38</sup> If an unmarried individual falls seriously ill, she may need to rely on her cohabiting partner for care, but that partner has no right to unpaid leave. Likewise, the sick individual's siblings and grandparents might be able to provide care, but none of these family members has a legal right to take leave because the FMLA defines family narrowly.<sup>39</sup> In contrast to the FMLA, some foreign jurisdictions extend leave rights to de facto family members, such as cohabiting partners, and extended family members.<sup>40</sup> Unfortunately, *Obergefell* undermines the

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34. Marriage continues to be a strong norm for college-educated individuals and individuals with good incomes, but marriage rates have declined for other demographic groups. See generally PEW RESEARCH CTR., THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES (2010), <http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf> [https://perma.cc/QW8U-2S5N].

35. See Rich Miller, *Single Americans Now More Than Half of U.S. Population*, CHI. TRIB. (Sept. 10, 2014, 9:49 AM), <http://www.chicagotribune.com/news/nationworld/ch-single-americans-population-20140910-story.html> (citing 2014 data showing that a majority of Americans were unmarried) [https://perma.cc/6TV5-XSFN]; PEW RESEARCH CTR., *supra* note 34, at i (“About half (52%) of all adults in [the United States] were married in 2008; back in 1960, seven-in-ten (72%) were.”).

36. See, e.g., Huntington, *supra* note 17, at 28–30; R.A. Lenhardt, *Integrating Equal Marriage*, 81 FORDHAM L. REV. 761, 764–65 (2012); see also CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 97–101 (2010).

37. Of course, family leave is only one of many legal areas where marriage matters. “Valid marriage under state law is also a significant status for over a thousand provisions of federal law.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015).

38. Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2612(a)(1)(C) (2012) (granting employees right to take leave “[i]n order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition”).

39. See *id.*

40. For example, in Ontario, Canada, the law allows employees to take “family caregiver leave” to care for parents, children, siblings, grandparents, grandchildren, and any other relative who is a legal dependent of the employee. See *Family Caregiver Leave*, ONT. MINISTRY LAB., <https://www.labour.gov.on.ca/english/es/pubs/guide/caregiver.php> (last revised Nov. 20, 2015) [https://perma.cc/3UDN-YMVP]. Additionally, when someone is at risk of dying, Ontario’s law grants “family medical leave” to a wider range of caregivers,

spirit of recognizing and supporting diverse family configurations that extend beyond married couples and the nuclear family.<sup>41</sup> Failing to address the medical needs of unmarried adults undermines not only those individuals' dignity but also public health more generally.

The distinctiveness of South Africa's Constitution may lead some to wonder whether *Fourie*'s conceptualization of marriage is inapplicable to other constitutional regimes. South Africa is one of only a few countries to explicitly bar sexual orientation discrimination in its constitution.<sup>42</sup> While at first blush, one might believe this feature makes South Africa uniquely positioned to protect same-sex marriage rights on the basis of equality without discussing same-sex marriage as a fundamental liberty, this contention is misguided for at least two reasons.

First, jurisdictions beyond South Africa have treated sexual orientation as a protected category under constitutional law even though their constitutions do not explicitly address sexual orientation. Jurisdictions ranging from Canada to Hong Kong have reasoned that sexual orientation discrimination is subject to strong judicial scrutiny because it is sufficiently similar to other forms of prohibited discrimination, such as racial and gender discrimination.<sup>43</sup> Likewise, in the United States prior to *Obergefell*, some federal appellate courts and state supreme courts struck down same-sex marriage bans on equality grounds without invoking the fundamental right to marry, reasoning that sexual orientation is a protected category.<sup>44</sup> These cases all suggest that there are pathways for striking down same-sex marriage bans without invoking the fundamental right to marry, even if the jurisdiction's constitution does not explicitly bar sexual orientation discrimination.

Second, courts can hold that same-sex marriage bans violate the fundamental right to marry without overglorifying marriage. Prior to *Obergefell*, the Fourth and Tenth Circuits struck down same-sex marriage

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including aunts, uncles, nephews, nieces, and other individuals who are functionally like a family member. *See id.*

41. *Cf.* Huntington, *supra* note 17, at 29 ("The legal system already does far too little to support nonmarital families, and Justice Kennedy's opinion reinforces the notion that these families are deviant.").

42. *See* S. AFR. CONST., 1996, ch. 2, § 9(3)–(4).

43. *See* Egan v. Canada, [1995] S.C.R. 513 (Can.); *Sec'y for Justice v. Yau Yuk Lung*, [2007] 10 H.K.C.F.A.R. 335, 345–46, 349 (C.F.A.).

44. *E.g.*, *Latta v. Otter*, 771 F.3d 456, 467–68 (9th Cir. 2014); *Baskin v. Bogan*, 766 F.3d 648, 654 (7th Cir. 2014); *Varnum v. Brien*, 763 N.W.2d 862, 889 (Iowa 2009). These courts refer to sexual orientation as a "suspect" or "quasi-suspect" classification. The U.S. Supreme Court has never found sexual orientation to be a suspect or quasi-suspect classification, but it has struck down discriminatory laws that were based on antigay animus. *See generally* *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Romer v. Evans*, 517 U.S. 620 (1996). The *Obergefell* Court also held that same-sex marriage bans impermissibly discriminate based on sexual orientation and, in reaching this conclusion, emphasized that same-sex couples were being denied a fundamental right. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015); *see also* Hunter, *supra* note 17, at 113 (questioning "how strong . . . the Court's commitment to equality [will] be when there is no fundamental liberty involved to make apparent the inequality of a sexual orientation classification").

bans, concluding that they violated the fundamental right to marry.<sup>45</sup> Yet neither of these courts suggested, as *Obergefell* did, that marriage dignifies couples. Rather, the Fourth and Tenth Circuits focused primarily on the importance of marriage as an act of self-definition.<sup>46</sup> In this regard, these opinions are more like *Fourie* than *Obergefell*. However, neither of these circuits went as far as *Fourie* in acknowledging critiques of marriage and in explicating the injuries caused by denying marital choice.<sup>47</sup>

## II. BEYOND MARRIAGE: RECOGNITION BY REGISTRATION VERSUS RECOGNITION BY ASCRIPTION

Looking beyond marriage, law reform groups in both the United States and South Africa have called for extending legal rights and responsibilities to unmarried couples. In South Africa, *Fourie* set a supportive tone for developing protections for unmarried couples because it recognized that being unmarried is a legitimate choice.<sup>48</sup> However, even in the United States, *Obergefell*'s glorification of marriage notwithstanding, some states and local governments have extended legal protections to unmarried couples.<sup>49</sup> This part of the Article examines ongoing debates about developing new legal rights and responsibilities for unmarried couples.

Before discussing pending proposals regarding unmarried couples, it is helpful to develop a clearer picture of the existing legal landscape of relationship recognition, starting with South Africa. *Fourie* ordered the South African Parliament to pass legislation extending marriage rights to same-sex couples.<sup>50</sup> Parliament responded by enacting the Civil Union Act, which the president's office signed into law.<sup>51</sup> The Civil Union Act granted both same-sex and different-sex couples the options of registering their relationships as either a marriage or a civil partnership.<sup>52</sup>

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45. *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014).

46. See *Bostic*, 760 F.3d at 373–77 (emphasizing “freedom of choice”); *Kitchen*, 755 F.3d at 1212–24 (repeatedly referring to the right to marry as a matter of “personal choice”).

47. See *supra* notes 24–31 and accompanying text.

48. See *supra* notes 21–27 and accompanying text.

49. For discussion about *Obergefell*'s glorification of marriage, see *supra* notes 12–16 and accompanying text.

50. *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at 576 para. 136, 585 para. 161 (S. Afr.). For my previous writing on the sociopolitical significance of Parliament's role, see generally Lau, *supra* note 20.

51. See Civil Union Act 17 of 2006 (S. Afr.). Deputy President Mlambo-Ngcuka signed the law while President Thabo Mbeki was abroad. *SA Same-Sex Marriage Law Signed*, BBC NEWS (Nov. 30, 2006), <http://news.bbc.co.uk/2/hi/africa/6159991.stm> [https://perma.cc/RGP3-LQC9].

52. Civil Union Act 17 of 2006 § 1. The development of the civil partnership option was not originally motivated by an enlightened desire to give couples a choice between marriage and an alternative option. See Pierre de Vos & Jaco Barnard, *Same-Sex Marriage, Civil Unions and Domestic Partnerships in South Africa: Critical Reflections on an Ongoing Saga*, 124 S. AFR. L.J. 795, 808 (2007). Instead, opponents of same-sex marriage intended to make civil partnerships the only option for same-sex couples. See *id.* After that



Note that “civil union” has different meanings in South Africa and in the United States. In parts of the United States where civil unions are offered—Colorado, Hawaii, Illinois, and New Jersey—civil unions are an alternative to marriage.<sup>53</sup> Civil unions carry virtually all the same legal consequences as marriage under state law,<sup>54</sup> but a couple might opt for a civil union to avoid the symbolism of marriage. In contrast to the United States, South Africa uses “civil union” as an umbrella term covering marriages and civil partnerships.<sup>55</sup> In other words, marriages and civil partnerships are two different forms of civil unions. Civil partnerships in South Africa are the equivalent of civil unions in the United States.

When Parliament passed the Civil Union Act, it failed to abolish the preexisting Marriage Act, which also grants marriage rights to different-sex couples.<sup>56</sup> Thus, as a technical matter, different-sex couples in South Africa can either marry pursuant the Civil Union Act or the Marriage Act,<sup>57</sup> but there is no legal difference between these marriages. Human rights activists have condemned the South African Parliament’s preservation of the Marriage Act because it remains a symbol of inequality.<sup>58</sup>

South African law also includes the Recognition of Customary Marriages Act (“the Customary Marriages Act”), which allows for the legal registration of marriages that are “concluded in accordance with customary law” of indigenous South African groups.<sup>59</sup> Much commentary has focused on the fact that the Customary Marriages Act permits the legal recognition of certain polygamous marriages.<sup>60</sup> Some commentators believe this aspect of the Customary Marriages Act is unconstitutional because indigenous polygamous practices perpetuate the subordination of women.<sup>61</sup> It is,

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plan was condemned for failing to comply with *Fourie*, Parliament developed the bill that ultimately became the Civil Union Act. *See id.*

53. NAT’L CTR. FOR LESBIAN RIGHTS, MARRIAGE, DOMESTIC PARTNERSHIPS, AND CIVIL UNIONS: SAME-SEX COUPLES WITHIN THE UNITED STATES 2 (2015), [http://www.nclrights.org/wp-content/uploads/2013/07/Relationship\\_Recognition.pdf](http://www.nclrights.org/wp-content/uploads/2013/07/Relationship_Recognition.pdf) [https://perma.cc/P77B-WQF2].

54. *See id.*

55. Civil Union Act 17 of 2006 § 1.

56. *See* David Bilchitz & Melanie Judge, *The Civil Union Act: Messy Compromise or Giant Leap Forward?*, in *TO HAVE & TO HOLD: THE MAKING OF SAME-SEX MARRIAGE IN SOUTH AFRICA* 149, 156 (Melanie Judge et al. eds., 2008).

57. *See id.*

58. *See, e.g.*, Bilchitz & Judge, *supra* note 56, at 149.

59. Recognition of Customary Marriages Act 120 of 1998 § 1 (S. Afr.).

60. *See, e.g.*, Penelope E. Andrews, “Big Love”?: *The Recognition of Customary Marriages in South Africa*, 64 WASH. & LEE L. REV. 1483, 1484 (2007); Penelope E. Andrews, *Who’s Afraid of Polygamy?: Exploring the Boundaries of Family, Equality and Custom in South Africa*, 2009 UTAH L. REV. 351; Pierre de Vos, *Further Thoughts on Polygamy*, CONSTITUTIONALLY SPEAKING (Jan. 6, 2010), <http://constitutionallyspeaking.co.za/further-thoughts-on-polygamy/> [https://perma.cc/LDZ7-FXLU]; Pierre de Vos, *Is Polygamy Unconstitutional?*, CONSTITUTIONALLY SPEAKING (Jan. 4, 2010) [hereinafter de Vos, *Is Polygamy Unconstitutional*], <http://constitutionallyspeaking.co.za/is-polygamy-unconstitutional/> [https://perma.cc/8DWH-LFC5].

61. *See, e.g.*, COLLEEN LOWE MORNA ET AL., GENDER LINKS, GENDER IN THE 2009 SOUTH AFRICAN ELECTIONS 10, 18 (2010), [http://genderlinks.org.za/wp-content/uploads/imported/articles/attachments/13667\\_gc2324\\_sa\\_election\\_report.pdf](http://genderlinks.org.za/wp-content/uploads/imported/articles/attachments/13667_gc2324_sa_election_report.pdf) (noting that the advocacy group

however, beyond the scope of this Article to delve into the debate about the constitutionality of polygamy. Instead, this Article highlights the Customary Marriages Act, the Marriage Act, and the Civil Union Act to demonstrate that, as a group, these laws now permit adults to register their relationships in a variety of ways.

In 2008, South Africa's Home Affairs Bureau proposed the Domestic Partnership Bill, which has fueled ongoing debate. If passed, the bill would offer yet another form of legal recognition for adult relationships.<sup>62</sup> It would make "domestic partnership" a legal status that carries some, but not all, of the legal consequences of marriage.<sup>63</sup> For example, registered domestic partners would have the same rights as spouses to seek damages based on wrongful death, but different property ownership rules would be applied to spouses, as opposed to registered domestic partners.<sup>64</sup> In addition to allowing couples to register as domestic partners, the proposed law would ascribe the status of "unregistered domestic partnership" to some cohabiting couples.<sup>65</sup> This status would allow individuals in an unregistered couple to sue each other for support and property distribution if they end their relationship.<sup>66</sup> Unregistered domestic partners would also have rights to inheritance and support payments from a deceased partner's estate.<sup>67</sup> Recognizing unregistered domestic partnerships would help to protect dependent partners who find themselves financially vulnerable upon breaking up with or the death of their partner.<sup>68</sup>

Commentators have debated the merits of the Domestic Partnership Bill since its proposal.<sup>69</sup> In these debates, the prospect of legally recognizing

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Gender Links believes that polygamy in South Africa is likely unconstitutional) [<https://perma.cc/VB6S-URMY>]; de Vos, *Is Polygamy Unconstitutional*, *supra* note 60 (noting that "[i]t is often said that polygamous marriages are unconstitutional," but concluding that the author is "not sure a court will declare polygamy unconstitutional").

62. Domestic Partnerships Bill 2008, G.N. 36 of G.G. 30663 (14 Jan. 2008) (S. Afr.).

63. *See id.* § 2.

64. *Id.* § 21.

65. *See generally id.* §§ 26–33.

66. *See id.* § 32.

67. *See id.* § 21. South Africa currently recognizes unregistered same-sex domestic partners (or "life partners") for a range of purposes, such as inheritance and pensions. *See de Vos & Barnard, supra* note 52, at 823. South Africa granted these rights to same-sex couples when same-sex couples could not yet marry, and these rights have not been rescinded. *See id.* at 822. Commentators have criticized the fact that the law currently discriminates between unregistered partners based on sexual orientation, whereby same-sex couples have rights that their heterosexual counterparts lack. *See id.* at 822–24. Unregistered couples in South Africa can use contracts to formalize agreements with each other. South Africa does not recognize the doctrine of common law marriage, which allows couples in some parts of the United States to be legally married without formally registering their marriage. *See id.* at 803.

68. *See, e.g.,* Helen Kruse, 'Here's to You, Mrs Robinson': Peculiarities and Paragraph 29 in Determining the Treatment of Domestic Partnerships, 25 S. AFR. J. HUM. RTS. 380, 387 (2009) (criticizing the law for failing to protect unmarried couples upon the death of one partner).

69. *See, e.g.,* Ben Coetzee Bester & Anne Louw, *Domestic Partners and "The Choice Argument": Quo Vadis?*, 18 POTCHEFSTROOM ELECTRONIC L.J. 2951, 2969 (2015); Kruse, *supra* note 68, at 389; Bradley Smith, *Rethinking Volks v. Robinson: The Implications of*

registered domestic partners appears much less controversial than legally recognizing *unregistered* domestic partners.<sup>70</sup> Commentators have raised concerns about the recognition of unregistered domestic partnerships because doing so imposes a status on couples that they do not choose, compromising the principle of self-determination.<sup>71</sup> Notably, in the United States, some commentators have opposed legally recognizing couples through any alternative to marriage because they contend that such alternatives would symbolically devalue the institution of marriage.<sup>72</sup> In South Africa, however, this has not been a significant worry; instead, concerns raised by commentators have centered around the issue of self-determination.<sup>73</sup>

In some U.S. states, policymakers have rejected the idea that marriage must be preserved as the sole form of relationship recognition.<sup>74</sup> In these states, like in South Africa, there are now multiple ways to register adult relationships.<sup>75</sup> For example, in Colorado, different-sex and same-sex couples can register their relationships as a marriage or civil union.<sup>76</sup> In addition, any two adults who are not in a marriage or civil union can register each other as a “designated beneficiary.”<sup>77</sup> Designated beneficiaries do not have the full panoply of rights and responsibilities that are conferred by marriage or civil union. Instead, upon registration, designated beneficiaries can sign up for a limited set of rights including the right to have standing to sue for wrongful death, hospital visitations, medical decision making, employee pensions, and inheritance.<sup>78</sup>

Individuals choose to become designated beneficiaries for a variety of reasons. For example, a young couple might wish to formalize their relationship without yet undertaking the deeper commitment of marriage because they view their relationship as a trial period. An elderly widow and widower may choose to become designated beneficiaries because they are romantically involved but do not wish to remarry. Additionally, two elderly

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*Applying a “Contextualized Choice Model” to Prospective South African Domestic Partnerships Legislation*, 13 POTCHEFSTROOM ELECTRONIC L.J. 238, 239 (2010).

70. See, e.g., Bester & Louw, *supra* note 69, at 2969–74; Smith, *supra* note 69, at 287–94.

71. Due to concerns about self-determination, some commentators believe that “unregistered domestic partnership” must be defined narrowly so that the status is ascribed only under exceptional circumstances; commentators disagree, however, about how to define such circumstances. See, e.g., Bester & Louw, *supra* note 69, 2969–74; Smith, *supra* note 69, at 238–39.

72. See, e.g., Lynn Wardle, *Deconstructing Family: A Critique of the American Law Institute’s “Domestic Partners” Proposal*, 2001 BYU L. REV. 1189, 1226.

73. See *supra* notes 70–71 and accompanying text.

74. Eleven states and the District of Columbia allow adults to register their relationships in some form other than just marriage. See NAT’L CTR. FOR LESBIAN RIGHTS, *supra* note 53, at 2. These alternative statuses include civil unions, domestic partnerships, designated beneficiaries, and reciprocal beneficiaries. See *id.*

75. See *id.*

76. See COLO. REV. STAT. §§ 14-15-107, -117 (2013) (civil union law); see also NAT’L CTR. FOR LESBIAN RIGHTS, *supra* note 53, at 5.

77. COLO. REV. STAT. § 15-22-105 (designated beneficiaries law).

78. See *id.*

sisters who have become each other's primary caregiver may wish to formalize their relationship through the designated beneficiary system.

Programs like Colorado's designated beneficiary registry and South Africa's proposed scheme for registered domestic partnerships serve important public policy goals.<sup>79</sup> First, giving partners a meaningful registration alternative to marriage enables freedom of choice.<sup>80</sup> Second, this option promotes the government's interest in supporting caregiving relationships, which in turn enhances the well-being of its citizenry.<sup>81</sup> These registration programs advance this goal by providing security and clarity to partners who do not wish to marry. For example, a registered couple can rest assured that if one partner becomes sick, the other will have hospital visitation and medical decision-making rights. If one partner dies, the other may be financially cared for through rights to inheritance and the possibility of wrongful death damages.<sup>82</sup> Relationship registries that confer rights related to relationship dissolution (e.g., property distribution and alimony) also promote the well-being of citizens by helping couples transition out of their relationships.<sup>83</sup>

While a number of U.S. states have expanded relationship registration options, there has been considerable resistance to relationship recognition through ascription. In 2002, the American Law Institute (ALI) encouraged all states to adopt legislation to ascribe domestic partnership status to

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79. As this Article later discusses, success of such partnership registries requires certain conditions. For example, the government must adequately educate the public about the availability of the registries and design the registries to provide a set of rights and responsibilities that appeals to potential registrants. For further discussion on these points, see *infra* notes 96–100 and accompanying text.

80. While choice is important to the principle of autonomy, it is worth noting that offering more choices is not always better. If a state offers too many relationship registration options, the registration system can become confusing and difficult to administer. For elaboration on this point, see Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 600 (2013). Giving people one meaningful registration alternative to marriage, however, is unlikely to pose such problems. Civil unions in the United States and civil partnerships in South Africa arguably are not very meaningful choices for people seeking an alternative to marry because these registration options differ from marriage in name only. See *id.* at 576–77.

81. See generally MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS* (2010).

82. People can obtain some of these protections through private agreements such as healthcare proxies, wills, and contracts. However, forming these agreements with the help of attorneys is usually more complicated and more expensive than filing paperwork for a government registry. Thus, relationship registries perform what Carl Schneider has called the “facilitative function” of family law. See Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 497 (1992). Relationship registries provide clarity that is often missing from private agreements, which can be poorly written or, in some cases, entirely unwritten. See Ira Ellman, “Contract Thinking” Was Marvin’s Fatal Flaw, 76 NOTRE DAME L. REV. 1365, 1367 (2001) (contending that contracts, whether written or oral, are poor tools for addressing intimate partnerships because “couples do not in fact think of their relationship in contract terms”).

83. Recall that *Fourie* acknowledged the importance of dissolution rights afforded to married couples. See *supra* notes 32–33 and accompanying text.

couples cohabiting for significant durations of time.<sup>84</sup> Some prominent legal scholars have echoed the ALI's call.<sup>85</sup> These proposals are chiefly aimed at the protection of vulnerable parties during the dissolution of unmarried partnerships.<sup>86</sup> Still, nearly fifteen years after the ALI published its proposal, only one state—Washington—has adopted an ascriptive regime.<sup>87</sup> Some commentators in the United States have raised concerns echoing the critiques in South Africa about ascriptive regimes compromising self-determination.<sup>88</sup>

After same-sex marriage became legal in the United States, some states discontinued alternative forms of relationship registration.<sup>89</sup> For example, five states that previously offered civil unions to same-sex couples stopped granting civil unions.<sup>90</sup> This trend reflected the view that civil unions were an inferior status offered to same-sex couples when same-sex marriage was unavailable, and, now that same-sex couples can legally marry, civil unions are obsolete.<sup>91</sup> Although some jurisdictions have indeed abolished alternatives to marriage, others have intentionally preserved these

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84. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 4–7 (AM. LAW INST. 2002). According to the ALI principles, a couple should be considered a legally recognized domestic partnership if they cohabit for a certain duration of time specified by the state. *See id.* § 6.03. The principles suggest that the requisite duration should be shorter in cases where couples have children. *See id.* The principles also list factors that can be used to rebut the presumption of domestic partnership. *See id.* The principles allow couples to avoid being recognized as domestic partners by contracting around the default rule. *See id.* §§ 7.01–.12.

85. See, e.g., BOWMAN, *supra* note 36; Nancy D. Polikoff, *Making Marriage Matter Less: The ALI Domestic Partner Principles Are One Step in the Right Direction*, 2004 U. CHI. LEGAL F. 353.

86. See, e.g., BOWMAN, *supra* note 36, at 222–23 (discussing the protection of vulnerable parties); Polikoff, *supra* note 85, at 353 (noting the goal of “achiev[ing] fairness when a family dissolves”).

87. See Aloni, *supra* note 80, at 590 (citing *Olver v. Fowler*, 168 P.3d 348, 350 (Wash. 2007); *In re Marriage of Lindsey*, 678 P.2d 328, 331 (Wash. 1984)). Couples can also contract a common law marriage in nine states and the District of Columbia. See BOWMAN, *supra* note 36, at 47–48. I do not consider common law marriage to be an ascriptive regime. Even though couples in a common law marriage never formalize their marriage through registration, they must *choose* to be married: common law marriage requires that the couple demonstrate an intent to be married and hold themselves out as a married couple. *See id.* at 55. Some courts, however, have defined the elements of common law marriage so loosely that common law marriage arguably begins to look more like an ascriptive regime. See, e.g., *Parker v. Parker*, 265 S.E.2d 237, 240 (N.C. Ct. App. 1980) (stating that a couple's mutual agreement to enter a common law marriage can be inferred).

88. See, e.g., Aloni, *supra* note 80, at 616; Marsha Garrison, *Is Consent Necessary?: An Evaluation of the Emerging Law of Cohabitation Obligation*, 52 UCLA L. REV. 815, 856–57 (2005); Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 262. As noted above, commentators have also raised concerns about the devaluation of marriage. See *supra* note 72 and accompanying text.

89. See generally NAT'L CTR. FOR LESBIAN RIGHTS, *supra* note 53.

90. The five states are Connecticut, Delaware, New Hampshire, Rhode Island, and Vermont. *See id.* at 6, 15, 18, 20.

91. See Joanna L. Grossman, *Though Obsolete, the Civil Union Continues to Mystify Courts*, VERDICT (Nov. 24, 2015), <https://verdict.justia.com/2015/11/24/though-obsolete-the-civil-union-continues-to-mystify-courts> (“[T]he civil union has been made essentially irrelevant . . .”) [<https://perma.cc/ZB68-SZ5D>].

alternative registration statuses to give couples more options.<sup>92</sup> In fact, some local governments have deliberately expanded relationship registration options even after same-sex marriage became legal.<sup>93</sup>

In light of these developments, this Article recommends pragmatically refocusing law reform efforts. In the United States, advocates of law reform should focus on proposing a model law for registering domestic partnerships that would confer some, but not all, the legal consequences of marriage. To date, neither the ALI nor the Uniform Law Commission has offered a model law of this sort. The time is ripe for doing so.<sup>94</sup> Meanwhile, in South Africa, law reform proponents should focus on persuading Parliament to adopt legislation on registered partnerships, leaving legislation on unregistered partnerships for consideration later. These focal shifts are pragmatic and maintain agnosticism on the merits of ascriptive regimes. In South Africa and in at least some U.S. states, there seems to be a growing acceptance of developing multiple relationship registration options. This acceptance makes expanding registration options more feasible than reform targeting ascription. As discussed above, developing relationship registration options beyond marriage can advance important policy goals.<sup>95</sup>

A small but growing body of scholarly literature has begun to explore how registration schemes can be most successful.<sup>96</sup> This literature should be further developed to address questions such as: What rights and responsibilities should be conferred upon registration?<sup>97</sup> How can governments best educate people about a new registration option?<sup>98</sup> How

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92. See, e.g., Savannah Luschei, *Berkeley City Council Dismisses Proposal to Close City's Domestic Partnership Registry*, DAILY CALIFORNIAN (Oct. 7, 2013), <http://www.dailycal.org/2013/10/07/berkeley-city-council-dismisses-proposal-close-citys-domestic-partnership-registry/> (discussing the retention of a municipal domestic partnership registry in Berkeley, California) [<https://perma.cc/Z9AD-MZZ8>].

93. See, e.g., George Hesselberg, *Opposite-Sex Partners Get Same Benefits as Same-Sex Partners in Domestic Relationships in Dane County*, WIS. ST. J. (May 13, 2016), [http://host.madison.com/wsj/news/local/opposite-sex-partners-get-same-benefits-as-same-sex-partners/article\\_9e383647-600f-566a-9fca-8ef741c105a9.html](http://host.madison.com/wsj/news/local/opposite-sex-partners-get-same-benefits-as-same-sex-partners/article_9e383647-600f-566a-9fca-8ef741c105a9.html) (discussing Dane County, Wisconsin's decision to grant different-sex couples the ability to register as domestic partners, an option previously available only to same-sex couples) [<https://perma.cc/6WBM-4Q4L>]; Ken Jackson, *Commission Creates Domestic Partner Registry*, OSCEOLA NEWS-GAZETTE (Aug. 10, 2016, 9:43 AM), <http://www.aroundosceola.com/commission-creates-domestic-partner-registry/> (reporting the establishment of a new domestic partnership registry in Osceola County, Florida) [<https://perma.cc/GU5H-BFHU>].

94. The Law Commission of Canada has issued a report of this sort. See generally LAW COMM'N OF CAN., BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS (2001).

95. See *supra* notes 79–83 and accompanying text.

96. See, e.g., Aloni, *supra* note 80; Jessica R. Feinberg, *The Survival of Nonmarital Relationship Statuses in the Same-Sex Marriage Era: A Proposal*, 87 TEMP. L. REV. 45 (2014); Jihyun Kim et al., *The Rise of Pacts: A New Type of Commitment from the City of Love*, 56 WASHBURN L.J. 69 (2016).

97. The legal effects of an alternative registration option must be sufficiently fewer than the effects of marriage, so that people are given a meaningful choice between the options; however, there must be sufficient effects to make registration consequential.

98. Research suggests that South Africans may not be aware of the various relationship registration options that already exist. See Elena Moore & Chuma Himonga, *Customary*

might governments ensure that a new registration option will not deter couples from supporting each other more deeply through marriage?<sup>99</sup> To address such questions, existing scholarship has often studied the success story of the *pacte civil de solidarité*, France's version of domestic partnership registration that has become very popular, especially among couples seeking a trial period before marriage.<sup>100</sup> Future scholarship should branch out and examine the successes and failures of newer registration schemes, such as Colorado's designated beneficiary system.

#### CONCLUSION

A close look at the United States and South Africa suggests that South Africa has developed a better approach to same-sex marriage. Looking beyond same-sex marriage, both South Africa and the United States should explore legal reforms to expand options for relationship registration.

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*Marriage: Is the Law Working?*, GROUNDUP (Mar. 1, 2016), <http://www.groundup.org.za/article/customary-marriage-law-working/> (suggesting that many South Africans in customary marriages do not know that they can register those marriages for legal recognition) [<https://perma.cc/GBC7-PPZ9>].

99. Cf. Elizabeth S. Scott, *A World Without Marriage*, 41 FAM. L.Q. 537, 551, 562–66 (2007) (discussing the possibility that, due to the different social meanings of marriages and civil unions, couples who marry make a greater commitment to each other than couples who enter civil unions).

100. See *supra* note 96.